Supreme Court, U.S.
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In The

Supreme Court of the United States

SKOSHI THEDFORD FARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

MACK K. MARTIN
MARTIN LAW OFFICE
125 Park Ave., Fifth Floor
Oklahoma City, OK 73102
Telephone: (405) 236-8888
Facsimile: (405) 236-8844
Email: Mack@martinlawoffice.net
Counsel for Petitioner
Skoshi Thedford Farr

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Skoshi Thedford Farr was indicted for a violation of 26 U.S.C. § 7201 alleging failure to pay quarterly payroll taxes. Based on a constructive amendment she was convicted of a different offense.

Following conviction, appeal and reversal the government re-indicted Farr, this time for a violation of 26 U.S.C. § 7201 for failure to pay trust fund recovery penalty. The new indictment was based on the same facts and evidence presented at the first trial and placed the government in a much more favorable position having drafted an indictment that correctly alleged the offense the government intended to prosecute in the first indictment.

Farr moved to dismiss the second indictment in the District Court on double jeopardy grounds contending the action of the Tenth Circuit in *Farr I* was tantamount to an acquittal and barred further prosecution. The District Court denied the motion and Farr appealed again to the Tenth Circuit in *Farr II* urging a double jeopardy bar to reprosecution. The Tenth Circuit affirmed the district court and denied the double jeopardy argument.

The Fifth Amendment Double Jeopardy Clause of the United States Constitution prohibits putting a defendant in jeopardy twice for the same crime. The government has attempted to put Petitioner in jeopardy a second time after they failed to present a sufficient case against her the first time.

QUESTION PRESENTED – Continued

Is the Double Jeopardy Clause so fragile that its bar against a subsequent prosecution can be overcome by the trial court's issuance of an erroneous instruction?

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OPINIONS AND ORDERS BELOW

(1) The opinion of the United States Court of Appeals for the Tenth Circuit affirming the district court is published and available at *United States v. Farr*, 591 F.3d 1322 (10th Cir. 2010). (2) The United States Court of Appeals for the Tenth Circuit's opinion reversing Petitioner's initial conviction is published and available at *United States v. Farr*, 536 F.3d 1174 (10th Cir. 2008). (3) The district court's order denying Petitioner's "Motion to Dismiss Indictment" is unpublished but available in the record at App. 42. (4) The order denying the petition for rehearing and suggestion for en banc review was denied on February 10, 2010 and is available in the record at App. 53.

JURISDICTIONAL STATEMENT

Pursuant to Title 28, United States Code, Section 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals. The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being affected in accordance with Supreme Court Rule 29.4(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

26 U.S.C. § 7201:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

Petitioner, Skoshi Thedford Farr, was indicted for a violation of 26 U.S.C. § 7201, willfully attempting to evade and defeat the payment of a quarterly employment tax (two counts). During trial the district court realized there was no evidence to support the indictment. Rather than dismissing the indictment for insufficient evidence, the district court issued an instruction, over Petitioner's objection, which amended the indictment.

As a result of the instruction and constructive amendment to the indictment Petitioner was not allowed to argue to the jury that she did not commit the acts alleged in the indictment. The jury found Farr not guilty of count one and guilty of count two.

Thereafter, on appeal as to count two, the United States Court of Appeals for the Tenth Circuit reversed the conviction against Petitioner. This reversal as to count two was in essence an acquittal as without the erroneous instruction the district court noted it would have sustained Farr's "Motion for Judgment of Acquittal" based on insufficient evidence.

On remand following the appeal of *Farr I*, the district court dismissed the indictment. Thereafter, the government obtained a new one count indictment based on the same facts and evidence of count two of the original indictment. Benefitting from the experience of the first trial and the mistakes that the district court tried to correct with the erroneous instruction, the government took advantage of its

own wrong and obtained an indictment alleging a violation of 26 U.S.C. § 7201 for willfully attempting to evade and defeat the payment of trust fund recovery penalties.

Farr filed a "Motion and Memorandum of Law Requesting Dismissal of Indictment as Barred Under Double Jeopardy Clause of the Fifth Amendment." Following a response by the government, the district court denied Farr's double jeopardy claim. Pursuant to *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), Farr timely filed Notice of Appeal. The United States Court of Appeals for the Tenth Circuit affirmed the district court's order denying Farr's double jeopardy claim in *Farr II*. Petitioner sought and was denied a "Petition for Rehearing and Suggestion for En Banc Review." This Court granted Petitioner an extension of time to file her "Petition for Writ of Certiorari."

In their attempts to avoid the sanction of the double jeopardy clause, the district court and Tenth Circuit noted in *Farr I* that there was sufficient evidence to support a guilty verdict of Farr for violating section 7201 by evading the trust fund recovery penalty – an offense that Farr was not indicted for committing. Farr argued to both the district and appellate courts that relating the indicted offense (evading quarterly payroll taxes) both courts recognized there was insufficient evidence to convict. This same argument was advanced in *Farr II*, i.e., that the existence of evidence sufficient to convict in a "pretend" indictment cannot overcome the sanctions of

the double jeopardy clause. As a result of the decision of the Tenth Circuit in *Farr II*, a defendant can never argue double jeopardy if there appears to be sufficient evidence to support a conviction of any offense even one that is not or was not charged below. This overbroad interpretation of the Fifth Amendment makes the double jeopardy protection virtually meaningless or, at best a form of lip service.

As discussed in detail below, the Appellate Court's decision in *Farr II* virtually removes all of the protections of the Double Jeopardy Clause previously recognized by this Court.

ARGUMENT

The Fifth Amendment Double Jeopardy Clause of the United States Constitution prohibits putting a defendant in jeopardy twice for the same offense. The government has attempted to put Petitioner in jeopardy a second time after they failed to present a sufficient case against her the first time. Is the Double Jeopardy Clause so fragile that its bar against a subsequent prosecution can be overcome by the trial court's issuance of an erroneous instruction?

This Court has long been the last bastion for those weary defendants who have suffered repeated attempts by the government to imprison them. Throughout history, this Court has protected those

who the government preyed upon until they could no longer survive. Such is the scenario before the Court today as Petitioner asks this Court to protect her from the continuous attack of the government.

A. The decisions by the United States Court of Appeals for the Tenth Circuit was nothing less than an acquittal.

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow 'the State . . . to make repeated attempts to convict an individual for an alleged offense,' since 'the constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), (citing *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)).

This Court has dealt with the intricacies of the Fifth Amendment Double Jeopardy Clause on many occasions. The early decision in *Ball v. United States*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), provides the starting point for Double Jeopardy analysis. The Court was there faced with a situation where, three defendants were jointly charged with

murder and, after trial, two of the defendants were found guilty while the third defendant, M. Fillmore Ball, was acquitted. *Ball*, 163 U.S. at 663-664. The two defendants who had been found guilty then sued out a writ of error to the Supreme Court appealing that the indictment was faulty because it never alleged the time and place of death of the deceased. *Id.* at 664. The Court found that the indictment was fatally defective to support a conviction for murder and reversed the convictions and remanded the case for further proceedings. *Id.* Thereupon, a new indictment was returned against all three defendants, not just the two who had appealed, correcting the inadequacies of the previous indictment. After all three defendants' double jeopardy pleas were overruled a jury returned a guilty verdict against all three for murder. *Id.* at 665-666. Deciding, on a second appeal, that the Double Jeopardy Clause should have prevented further prosecution against Ball, *id.* at 671, the Court reasoned that although the first indictment lacked the requisite fullness and precision, it did charge Ball with murder and the jury returned a verdict on that charge against him. *Id.* at 670. In support of its decision, the Court quoted Justice Livingston's dissent in the famous case of *People v. Barrett*, 1 Johns. 66 (1806), where he stated that the case before the Court "presents the novel and unheard-of spectacle of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first. That a party shall be

deprived of the benefit of an acquittal by a jury, on a suggestion of this kind, coming, too from the officer who drew the indictment, seems not to comport with that universal and humane principle of criminal law 'that no man shall be brought into danger more than once for the same offense.' It is very likely permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end?" *Id.* at 667-668. The Court in *Ball* further quoted Justice Livingston's dissent discussing the possible scenarios a court would be faced with when a prosecutor's incorrect indictment would invalidate a prior decision; if a guilty verdict were returned there would likely be no issue so long as the substance of the charge was discernable by defense counsel. However, if a defendant were acquitted, then all the prosecutor would have to do is make a claim that his indictment was defective and he would get a second chance to convict the defendant. *Id.* at 668 (citing *Barrett, supra*, at 74). In summation, the Court in *Ball* stated, "The former indictment set forth a charge of murder, although lacking the requisite fullness and precision. The verdict of the jury, after a trial upon the issue of guilty or not guilty, acquitted Millard F. Ball of the whole charge, of murder, as well as of any less offense included therein." *Id.* at 670. Meanwhile, in deciding on the appeal of the two defendants who had been found guilty initially, the Court decided that they were not protected by the Double Jeopardy Clause. *Id.* at 671-672. The Court so decided because "a defendant who procures a judgment against him upon an indictment to be set aside may be tried anew

upon the same indictment, or upon another indictment, for the same offense of which he had been convicted." *Id.* at 672.

Eventually, from this early rule, the Court carved some narrow exceptions through *Burks v. United States* and its progeny. In *Burks*, the Court was faced with the question of "whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury." 437 U.S. at 5. The petitioner argued that the Court of Appeals decision in the first instance was that "the District Court had erred by not granting his motion for a judgment of acquittal [and] the appellate reversal was the operative equivalent of a district court's judgment of acquittal." *Id.* The petitioner further argued that "had the District Court found the evidence at the first trial inadequate, as the Court of Appeals said it should have done, a second trial would violate the Double Jeopardy Clause of the Fifth Amendment." *Id.* at 5-6. Answering these questions, the Supreme Court stated that because the appellate court held that "the United States had not fulfilled its burden," *id.* at 4, "the appellate decision unmistakingly meant that the District Court had erred in failing to grant a judgment of acquittal." *Id.* at 11. The Court reasoned that "to hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court." *Id.* Reviewing its past Double Jeopardy decisions, the

Court stated that the rule to be carried forward was that "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case . . . rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect . . . When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." *Id.* at 15. However, the Court went on to state that "the same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." *Id.* at 16.

The Court revisited the Double Jeopardy issue just a few years later in *Tibbs v. Florida*, 457 U.S. 31, 10 S.Ct. 2211, 72 L.Ed.2d 652 (1982), when faced with the question of "whether the Double Jeopardy Clause bars retrial after a state appellate court sets aside a conviction on the ground that the verdict was against 'the weight of the evidence.'" *Tibbs*, 457 U.S. at 41. The Court reiterated its *Burks* exception (i.e. the "Double Jeopardy Clause precludes retrial 'once the reviewing court has found the evidence legally insufficient' to support conviction." *Id.* at 40-41) to the basic rule, that "a defendant who successfully appeals a conviction is subject to retrial." *Id.* The Court went on to state that this exception rests on two policies:

"the Double Jeopardy Clause attaches special weight to judgments of acquittal," *id.*, and "'the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.'" *Id.* (citing *Burks v. United States, supra*). Furthermore, the Court reasoned that those policies "do not have the same force when a judge disagrees with a jury's resolution of conflicting evidence and concludes that a guilty verdict is against the weight of the evidence. *Id.* at 42. The Court so reasoned because, in such case, it does not follow that "acquittal was the only proper verdict." *Id.* As the Court explained, under such a scenario, "the appellate court sits as a 'thirteenth juror' and disagrees with the jury's resolution of the conflicting testimony." *Id.* As such, "this difference of opinion no more signifies acquittal than does a disagreement among the jurors themselves . . . [which this Court has recognized] does not result in an acquittal barring retrial under the Double Jeopardy Clause." *Id.* However, as this Court further explained, "a reversal based on the weight of the evidence . . . can occur only after the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict." *Id.* at 42-43.

A third case in the *Burks* progeny, *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), confronted the question of how little evidence the prosecution must have adduced at trial to warrant an insufficient evidence ruling. The Court ruled

that *Burks* does not require the prosecution to have presented no evidence of the crime charged in order for a reversal to be grounded on insufficient evidence. *Hudson*, 450 U.S. at 43. The defendant faced trial for murder in Louisiana state court and was found guilty. He then moved for a new trial, as this was his only means of challenging the sufficiency of the evidence under Louisiana law and the trial judge granted the motion because there was no evidence to show beyond a reasonable doubt to sustain the verdict. *Id.* The State retried the defendant and, after he was found guilty, the defendant sought a writ of habeas corpus claiming that his second trial should have been barred by the Double Jeopardy Clause. *Id.* at 42. Upon taking the case, the Court ruled that their decision in *Burks* controlled because "it [was] clear that petitioner moved for a new trial on the grounds that the evidence was legally insufficient to support the verdict and that the trial judge granted petitioner's motion on that ground." *Id.* at 43. The Court so reasoned because counsel for the petitioner had argued, on his motion for a new trial, that "the verdict . . . [was] contrary to the law and the evidence," *id.*, and because the trial judge ruled in favor of the defendant. *Id.*

Petitioner's argument falls squarely within the confines of this Court's above noted decisions. Concentrating first on *Ball*, Petitioner is either entitled to be free from further harassment, like Ball, or is situated in the same place as the two previously convicted defendants. Like Ball, Petitioner here was

charged with a valid indictment not lacking the "requisite fullness and precision." The validity of the indictment was never challenged and neither counsel contended that it was lacking in any way. Instead, the indictment simply charged a crime that Petitioner could not have committed. It properly alleged each element of the crime it charged, under 26 U.S.C. § 7201, but charged that crime with greater than necessary detail. Like the two guilty defendants in *Ball*, Petitioner was convicted and that conviction was overturned on appeal, but the merits of the first indictment were "fairly in issue in the first" trial, however, the evidence of criminal conduct presented to the jury was not the crime that was alleged in the indictment.

Regardless, comparing the facts to the Court's decisions in *Burks, et al.* proves there is no way that Petitioner can be retried. In *United States v. Martin Linen Supply Company*, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), this Court stated that "what constitutes an acquittal is not to be controlled by the form of the judge's action. Rather, [the Court] must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin*, 430 U.S. at 571. As such, it makes no difference what the Court of Appeals wishes to call its first decision, *United States v. Farr*, 536 F.3d 1174 (10th Cir. 2008), it was a resolution of the facts charged. The District Court had two decisions: based on the facts proven at trial it could

either enter a directed verdict for the defendant or allow the government to vary from the indictment. It chose to allow the government to vary and the decision was reversed by the appellate court. While the appellate court attempted to couch its decision as something other than an acquittal, and therefore not prohibiting reprosecution, there is simply no other plausible alternative. The appellate court remanded the case to the district court, and in doing so, effectively eliminated one of the two choices that the district court had originally. The government was not allowed to vary from the indictment, and Petitioner was not guilty of the crime as it was charged in the indictment.

Therefore, since the government could not vary from the indictment and the only possible choice that the appellate court had was to order a directed verdict for Petitioner, then this case fits squarely within *Burks*. The evidence the government presented at trial showed that Petitioner may have been liable for evading a different tax, but not the tax she was charged with evading. There was absolutely no evidence provided to show that Petitioner was liable for the crime as it was charged which, *ipso facto*, means that there could not have been sufficient evidence. Moreover, this was not the case of a trial error or a verdict against the weight of the evidence or evidence within the grey area created by *Hudson*, there was absolutely no evidence which could have led the jury to convict the defendant of having committed a violation of § 7201 as it was charged.

The very fact that the government attempted to vary from the indictment proves that point. There was no erroneous ruling by the district court that would have satisfied this Court's distinction, as set forth in *Burks*, and this was not the case of the Appellate Court sitting as a thirteenth juror. The evidence as presented to the jury did not shed light on the crime charged in the indictment. Put plainly and simply, to hold that the ruling of the Appellate Court was anything other than an acquittal would "create a purely arbitrary distinction between those in Petitioner's position and others who would enjoy the benefit of a correct decision by the District Court." Further still, correctly stated as a judgment of acquittal, the decision by the Court of Appeals should be given special weight. If it is not given the full weight of an acquittal, then the government is simply afforded another opportunity to convict Petitioner after it could not do so the first time due to their own mistake.

B. Regardless of which theory of the case the government wishes to pursue in the subsequent trial, it is precluded by this Court's decisions interpreting the Fifth Amendment Double Jeopardy Clause.

In light of the decisions in *Burks*, and its progeny, this Court has also ruled that an acquittal or dismissal on any theory of the crime charged precludes a subsequent prosecution for every other theory of that crime if "Congress . . . prescri[bes] . . . the 'allowable

unit of prosecution,' . . . " to include only one distinct offense. *Sanabria v. United States*, 437 U.S. 54, 69-70, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978).

In *Sanabria*, the petitioner and several others were indicted under 18 U.S.C. § 1955(a) for conducting, financing, managing, supervising, directing, or owning all or part of an illegal gambling business. An illegal gambling business is defined as a gambling business, involving five or more persons, in violation of the law of the location of the business. *Id.* at 56 (citing 18 U.S.C. § 1955(a) & (b)(1)). The defendants were charged with operating a "gambling business involv[ing] 'accepting, recording and registering bets and wagers on a parimutual [*sic*] number pool and on the result of a trial and contest of skill, speed, and endurance of beast . . . [in] violation of . . . M.G.L.A. Chapter 271, Section 17'." *Id.* at 57. During the course of trial, the evidence produced by the government showed the defendants to be engaged in horse betting and numbers betting, to which defense counsel moved for acquittal because the government had failed to prove a violation of Section 17, which had been construed by the Massachusetts courts not to include numbers betting among its violations. *Id.* at 57-58. The district court decided that the state law element was jurisdictional and every defendant need not violate the state law. The petitioner then moved to strike the evidence of numbers betting, which was eventually granted by the Court because numbers betting was found not to be prohibited by Section 217, but rather, by Section 7. *Id.* at 58-59.

Thereupon, counsel for petitioner moved for acquittal as the government had offered no evidence as to his connection to the horse betting activities. The court granted the motion because, "the offense had to be established in the terms that . . . [the Government] charged it, which was a violation of § 17." *Id.* at 59. Thereafter, the Government appealed seeking a new trial on the numbers betting. *Id.* at 60-61.

On appeal before this Court, the Government conceded that the acquittal on the horse betting issue precluded re-indictment for that issue, but its issue was "whether a retrial on the numbers theory of liability would be on the 'same offense' as that on which petitioner was acquitted." *Id.* at 64-65. The Government argued that the numbers theory had been dismissed from the indictment as though the single count indictment had charged two separate counts and dismissed the numbers count. *Id.* at 65.

Among its rulings, the Supreme Court first held that the acquittal was in relation to the entire indictment and not simply to a fraction of the formal indictment. *Id.* at 66. Thereafter, the Court went on to hold that, in the alternative, if the Government were correct and the numbers theory were dismissed, "a retrial on that theory would subject petitioner to a second trial on the 'same offense' of which he ha[d] been acquitted." *Id.* at 69. Even if one theory were dismissed, a subsequent trial of a defendant for conducting the same illegal acts as those at issue in the

first trial would subject him to a second trial on the same offense of which he was acquitted." *Id.*

The Court's reasoning for its rulings began with the fact that Congress held the right to "establish and define offenses." *Id.* By defining an offense and delineating the "allowable unit of prosecution," Congress delineates the protection afforded by the Double Jeopardy Clause and decides "whether a particular course of conduct involves one or more distinct 'offenses' under the statute. . . ." *Id.* at 69-70. Based on this reasoning, the Court decided that "the allowable unit of prosecution under § 1955 is defined as participation in a single 'illegal gambling business'" and "participation in a single gambling business is but a single offense, 'no matter how many state statutes the enterprises violated.'" *Id.* at 70-71. Furthermore, the Court stated that even if the Government only charged the defendant with horse betting and had he been acquitted, the Government would be precluded from prosecuting him for the same actions on the numbers betting theory, *id.* at 71-72, because "[t]he Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Id.* at 72 (citing *Brown v. Ohio*, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)).

Moreover, the Court found that the petitioner "was acquitted for insufficient proof of an element of the crime which both counts would share – that he was 'connected with' the single gambling business . . .

[which] stands as absolute bar to any further prosecution for participation in that business." *Id.* at 72-73. In a footnote to the preceding sentence, the Court stated that "connected with" "meant that he was found not to conduct, finance, manage, supervise, direct, or own [the business]." *Id.* at 72. Elementally, the government failed to prove the actus reus of the crime [conducting, financing, managing, supervising, directing, or owning], *see* 18 U.S.C. § 1955(a), in relation to the attendant circumstance of the crime [the gambling business being "illegal," as defined by the relevant state law].

The Government pursued the theory that the state law proscribed numbers betting and horse betting, when in fact the relied upon state law only proscribed horse betting, and it could not be proven that the appellant "conduct[ed], financ[ed], manag[ed], supervis[ed], direct[ed] or own[ed]" a business that was engaged in horse-betting activities. Therefore, regardless of the nature of any subsequent theory the Government might have wished to pursue, the appellant had already been acquitted of violating 18 U.S.C. § 1955 and could not be retried for violating 18 U.S.C. § 1955.

As the Court further stated, since the "Government . . . charged only a single gambling business, the discrete violations of state law which that business may have committed are not severable in order to avoid the Double Jeopardy Clause's bar on retrial for the 'same offense.'" *Sanabria*, 437 U.S. at 73.

Further still, the Court ruled that just as the Double Jeopardy Clause would be violated by the Government attempting to twice punish someone found guilty of a single conspiracy to violate multiple statutes, so too would the Clause be violated by trying a defendant multiple times for a single illegal business. *Id.* at 74. The Government alleged only one "illegal gambling business" and tried the appellant for his involvement in that business. As a result, the Court further held that, "even if the numbers allegation were 'dismissed' . . . a subsequent trial for conducting the same illegal gambling business as that at issue in the first trial would subject [appellant] to a second trial on the 'same offense' of which he was acquitted." *Id.*

The facts at hand fall directly within the confines of *Sanabria*. The statute at issue here, 26 U.S.C. § 7201, is nearly identical to the statute the Court faced in *Sanabria*, 18 U.S.C. § 1955. As is the case with § 1955, § 7201 charges only a single unit of prosecution; a single "tax." Whereas multiple units of prosecution would syntactically be written "any taxes," Congress chose to prosecute the statute under a single tax. Moreover, like § 1955, the duties imposed by penalty of criminal charges under § 7201 are defined elsewhere. While § 1955 defines an illegal gambling business as one violating the law of the state where it is conducted, § 7201 refers to the taxes imposed elsewhere in Title 26. Therefore, as the Court decided in *Sanabria*, evasion of a tax defined elsewhere in the statute is "but a single offense, 'no

matter how many statutes [were] violated.'" *Id.* at 70-71. It was from this conclusion that the Court went on to state that even if the Government had charged the defendant with the incorrect crime, i.e., horse betting in *Sanabria* or the evasion of the quarterly employment tax that Petitioner was originally charged with evading. Accordingly, as the Court further stated, the limitation of the Double Jeopardy Clause does not allow for the single crime existent in § 7201 to be divided into a "series of temporal or spatial units." *Id.* at 72 (citing *Brown*, 432 U.S. at 169).

Additionally, as the Court found in *Sanabria*, the Government here was unable to prove that Petitioner performed the actus reus, evaded or defeated, in relation to the attendant circumstance, a tax imposed by Title 26. Therefore, just like in *Sanabria*, Petitioner has already been acquitted of violating the charging statute, 26 U.S.C. § 7201.

Finally, as the Court in *Sanabria* stated, even if the Government were correct and the Tenth Circuit's ruling in *United States v. Farr*, *supra*, were a dismissal, Petitioner could not be reindicted for the trust fund recovery penalty. Comparatively, the Government could not prove that either Petitioner or the appellant in *Sanabria* were guilty of the crime of which they were indicted. Petitioner was not responsible for the quarterly employment tax and the appellant in *Sanabria* was not connected to the horse betting. However, while both Petitioner and the appellant in *Sanabria* could be convicted for separate

crimes, trust fund recovery penalty and numbers betting respectively, those crimes were charged incorrectly by the Government. Therefore, just like in *Sanabria*, the Double Jeopardy Clause would be violated by trying Petitioner multiple times for a single illegal act.

The Double Jeopardy Clause undoubtedly holds an important place in the history of American jurisprudence. Throughout history, this Court has held strong to the rigid requirement that the government cannot continuously prosecute an individual. This Court has long been the last line of defense against the government's infinite resources when they are used to wear down an individual with repeated prosecutions. The prosecution has long been held to one complete attempt to convict its prey and once that individual has been acquitted, she need not worry that she will be pursued further. It follows, that if the government has made a mistake in its attempt to prosecute an individual, they do not get repeated attempts to fix their mistakes. If a prosecutorial mistake is discovered prior to judgment the reasons in favor of reprosecution are great, but if the government continues to trial and attempts to convict an individual regardless of its mistake, only to mount a second attack after failing then the adversary system is without merit and defense counsel become nothing more than a Grim Reaper that shows up to walk a defendant through the futile war of attrition. However, this Court has never allowed the Double Jeopardy Clause, or a defendant's integrity, to be

reduced to a moving target for the government to repeatedly take aim.

CONCLUSION

For the foregoing reasons, Skoshi Thedford Farr respectfully requests a Writ of Certiorari issue to review the Opinion entered January 11, 2010, of the United States Court of Appeals for the Tenth Circuit in Case Number 09-6024.

Respectfully submitted,

MACK K. MARTIN
MARTIN LAW OFFICE
125 Park Ave.
Fifth Floor
Oklahoma City, OK 73102
Telephone: (405) 236-8888
Facsimile: (405) 236-8844
Email: Mack@martinlawoffice.net

Counsel for Petitioner
Skoshi Thedford Farr

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SKOSHI THEDFORD FARR, Defendant-Appellant.	No. 09-6024

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 5:08-CR-00271-F-1

(Filed Jan. 11, 2010)

Mack K. Martin (with Kendall A. Sykes on the briefs), of Martin Law Office, Oklahoma City, Oklahoma, for Defendant-Appellant.

Susan Dickerson Cox (with John C. Richter on the brief), U.S. Attorney's Office, Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before **KELLY**, **SILER**,* and **TYMKOVICH**, Circuit Judges.

SILER, Circuit Judge.

Skoshi Thedford Farr was convicted by a jury of evading taxes in violation of 26 U.S.C. § 7201. We reversed her conviction on appeal because the proof presented at trial and the district court's jury instructions constructively amended the indictment. She was subsequently indicted for violating the same statute based on the same conduct. The district court denied her motion to dismiss on double jeopardy grounds. For the reasons that follow, we **AFFIRM** the district court's decision.

I. Factual and Procedural Background

From 1984 through 1999, Farr served as the general manager or administrator of her husband's alternative medicine clinic in Oklahoma City, which he operated from 1978 until his death in December 1998. *United States v. Farr,* 536 F.3d 1174, 1176-77 (10th Cir. 2008). Based on the clinic's failure to pay certain employment taxes, she was indicted for violating 26 U.S.C. § 7201. *Id.* at 1177. Rather than

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* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

seeking only a broad indictment by simply reciting the generic language of § 7201, the government specifically charged:

> "[that Farr] willfully attempt[ed] to evade and defeat the payment of the quarterly employment tax for ATHA-Genesis Chapter due and owing by her to the United States of America for the quarters 6-99, 9-99, and 12-99 in the amount of $72,076.21 by concealing and attempting to conceal from the Internal Revenue Service the nature and extent of her assets and the location thereof and placing funds and property in the names of nominees . . . in violation of Title 26 United States Code, Section 7201."

Id. (quoting the indictment).

At trial, the government only presented evidence that Farr was personally assessed and failed to pay a "trust fund recovery penalty." *Id.* at 1178. Recognizing the indictment did not cover Farr's failure to pay a trust fund recovery penalty, the district court instructed the jury, as a matter of law, that the "[t]rust [f]und [r]ecovery [p]enalty assessed against the defendant [wa]s to be treated as equivalent of the quarterly employment tax referred to in . . . the indictment." *Id.* at 1179 (citing the jury instructions). The jury convicted Farr, who appealed her conviction. *Id.*

We concluded that the trial proceedings effected a constructive amendment of the indictment. *Id.* at 1180. We explained that while the indictment charged

Farr with failing to pay quarterly employment taxes, the government's own witnesses indicated that only the employer is liable for quarterly employment taxes and Farr was never the employer. *Id.* In light of this, the government sought to proceed against Farr for failing to pay the trust fund recovery penalty, and the district court in its jury instruction "effectively allowed the jury to convict Ms. Farr for failing to pay *either* the clinic's quarterly employment taxes purportedly 'due and owing by her' *or* the trust fund recovery penalty assessed personally against her." *Id.*

We went on to explain that had the government simply charged Farr generically under § 7201 with the willful evasion of a tax it could have proven its case against her using either theory. *See id.* at 1181. Instead, since it included particulars about the nature of the tax, the particulars of the tax became an essential and delimiting part of the charge itself. *Id.* Consequently, we reversed and remanded the case for a new trial. *Id.* at 1188.

Based on this court's reversal, the district court dismissed the case. The government then issued a new indictment charging Farr with violating § 7201 by failing to pay taxes she owed under the Trust Fund Recovery Act. She moved the district court to dismiss the case on double jeopardy grounds, and it refused. She now appeals the district court's decision.

II. Discussion

We review the district court's denial of a motion to dismiss an indictment on double jeopardy grounds de novo, and we review the district court's factual findings underlying the double jeopardy claim for clear error. *United States v. German,* 76 F.3d 315, 317-18 (10th Cir. 1996).

A. Judgment of Acquittal

The double jeopardy clause of the Fifth Amendment "guarantees that the State shall not be permitted to make repeated attempts to convict the accused," which would subject him to embarrassment, expense and ordeal, and compel "'him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 569 (1977) (quoting *Green v. United States,* 355 U.S. 184, 187-88 (1957), and citing *Downum v. United States,* 372 U.S. 734, 736 (1963)). The clause only creates an impediment to subsequent prosecution, however, when there was previously a judgment of acquittal on the charge. *See United States v. Scott,* 437 U.S. 82, 91-92 (1978).

"The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge," but "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the

evidence is insufficient to convict" does bar future prosecution on the same charge. *Id.; see United States v. DiFrancesco,* 449 U.S. 117, 132-33 (1980) ("It is acquittal that prevents retrial even if legal error was committed at the trial. This is why the law attaches particular significance to an acquittal." (citations and quotations omitted)). Whether a judgment or reversal constitutes an acquittal is not controlled by the form of the court's decision. *Martin Linen Supply Co.,* 430 U.S. at 571. "Instead, 'we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *United States v. Hunt,* 212 F.3d 539, 543 (10th Cir. 2000) (quoting *Martin Linen Supply Co.,* 430 U.S. at 5719, and citing *Scott,* 437 U.S. at 97, and *United States v. Appawoo,* 553 F.2d 1242, 1244 (10th Cir. 1977), for the same principle).

Neither the district court nor this court made factual findings tantamount to a judgment of acquittal. *See Hunt,* 212 F.3d at 544 (holding that the district court's conclusion that the packages were not in the "mail" as defined by statute when the theft occurred constituted a factual resolution of one of the elements of the crime in favor of the defendant and was equivalent to acquittal). While the district court implied that the government was incapable of proving the first element of the offense – that the quarterly employment tax was "due and owing" of Farr, it never found that the government could not or had not proven that element. For instance, the district court

said that it was "pulling the case out of the ditch for the government," implying that the government could not otherwise prove its case without finding that the government's evidence was insufficient.

Similarly, this court made no factual findings that the government had failed to prove an element of the offense. *See Farr,* 536 F.3d at 1186. In fact, we explicitly noted "that our ruling on the constructive amendment question does not speak to the question of evidentiary sufficiency, and thus does not implicate double jeopardy concerns." *Id.*

Furthermore, this court's decision that there had been a constructive amendment of the indictment was not per se a conclusion regarding the sufficiency of the evidence. The Fifth Circuit has expressly held that a constructive amendment does not bar retrial for the same offense. *See, e.g., United States v. Mize,* 820 F.2d 118, 119-20 (5th Cir. 1987) (concluding that its reversal based on a constructive amendment of the indictment did not bar defendant's second conviction based on an indictment containing proper allegations, because the court specifically held in its earlier opinion that it had not reversed defendant's conviction for insufficiency of the evidence and that retrial was not barred by double jeopardy); *see also United States v. Pacheco,* 434 F.3d 106, 116 (1st Cir. 2006) (indicating that even if the defendant could win on his claims of constructive amendment, that would "at most earn the defendant a retrial"). We recognized this when we explained that the "erroneous constructive amendment" did "nothing to imply an insufficiency in the

evidence." *Farr,* 536 F.3d at 1187. Because reversal for constructive amendment does not itself engender double jeopardy concerns and neither the district court nor this court made factual findings tantamount to acquittal, the double jeopardy clause is not implicated by Farr's retrial for the same statutory violation.

B. The *Blockburger* Test

According to the *Blockburger* test, if each offense for which the defendant is tried or punished contains a separate element not present in the other, double jeopardy does not bar the successive prosecution. *Blockburger v. United States,* 284 U.S. 299, 304 (1932). The *Blockburger* test, however, only applies in two scenarios: (1) when the government charges two offenses simultaneously which arise from the same conduct and may have the same elements, *see United States v. Morehead,* 959 F.2d 1489, 1506-07 (10th Cir. 1992); or (2) when, after a judgment of acquittal, the government charges a new offense which arguably has the same elements as the offense on which the defendant was acquitted, *see United States v. Genser,* 710 F.2d 1426, 1427 (10th Cir. 1983). Neither of those situations is present here. No court made a ruling synonymous with Farr's acquittal, and the current indictment charges only one offense. Furthermore, since the double jeopardy clause is not a bar to retrying Farr on the exact same offense, it does not matter whether she is instead charged with a different offense that requires proof of the same

elements. Thus, Farr has failed to show that her right to be free from double jeopardy is implicated by her current charges.

C. Other Flaws in the Indictment

This interlocutory appeal was limited only to the district court's denial of Farr's motion for acquittal based on double jeopardy. Accordingly, we do not consider, on this appeal, any other flaws in the indictment or potential grounds for dismissal.

III. Conclusion

For the reasons stated above, we **AFFIRM** the district court's denial of Farr's motion to dismiss her indictment and **REMAND** the matter to the district court.

536 F.3d 1174

United States Court of Appeals,
Tenth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Skoshi Thedford FARR, Defendant-Appellant.
No. 07-6187.

Aug. 19, 2008.

Mack K. Martin (Kendall A. Sykes with him on the briefs) of Martin Law Office, Oklahoma City, OK, for Defendant-Appellant.

Susan Dickerson Cox, Assistant United States Attorney (John C. Richter, United States Attorney, with her on the briefs), Oklahoma City, OK, for Plaintiff-Appellee.

Before KELLY, HOLLOWAY, and GORSUCH, Circuit Judges.

GORSUCH, Circuit Judge.

Skoshi Thedford Farr appeals her conviction for tax fraud. She alleges that during trial the government constructively amended the indictment against her – trying her not just for the crime described in the indictment but also for a separate and additional offense. We agree. The grand jury indicted Ms. Farr for one crime (failure to pay quarterly employment taxes for a medical clinic) but at trial the government pursued her for another offense (failure to pay a trust fund recovery penalty assessed against her personally). Under the

Constitution, the government may only proceed at trial against the accused "for . . . [an] infamous crime . . . on presentment or indictment of a Grand Jury." U.S. Const. amend. V. At the same time, we cannot agree with Ms. Farr's additional argument that there exists insufficient evidence in this record to sustain her conviction and thus that she cannot be subjected to retrial under a lawful indictment. Accordingly, we reverse but leave open the possibility of a new trial under a new indictment.

I

A

The Internal Revenue Code ("Code") requires "employer[s]" to deduct from their employees' wages the employees' share of FICA and individual income taxes. *See* 26 U.S.C. § 3102(a), 3402(a). The employer is liable for the withheld portion of the employees' payroll taxes and must pay over the full amount to the government each quarter. 26 U.S.C. § 3403.[1] These withheld amounts are considered to be held in a "special fund in trust for the United States" after collection each pay period until they are remitted to the government. 26 U.S.C. § 7501; *see Slodov v. United States,* 436 U.S. 238, 243, 98 S.Ct. 1778, 56 L.Ed.2d 251 (1978). After the employer pays net

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[1] Section 3403 provides in pertinent part that "[t]he employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter. . . ."

wages to its employees, the withheld taxes are credited to the employees "regardless of whether they are paid by the employer, so that the IRS has recourse *only against the employer* for their payment." *Slodov,* 436 U.S. at 243, 98 S.Ct. 1778 (emphasis added).

From 1984 through 1999, Ms. Farr served as the general manager or administrator of her husband's alternative medicine clinic in Oklahoma City, which he operated from 1978 until his death in December 1998. Apparently to avoid Internal Revenue Service ("IRS") scrutiny and collection efforts, the clinic used several names and associated tax identification numbers over the years, operating variously as "Genesis Medical Center," "Crossroads Unlimited Trust," and "ATHA-Genesis." Throughout its years of operation, the clinic filed quarterly federal tax returns (IRS Form 941) reporting wages paid and federal taxes withheld for employees, but failed conspicuously to pay those withheld quarterly employment taxes over to the federal government. The clinic's ever-changing name and tax identification number aided its efforts to avoid detection, making it difficult for IRS revenue officers to locate assets for the collection of the delinquent employment taxes.

The IRS is, of course, hardly without recourse in such circumstances. The Code provides a broad array of tools for the IRS to collect the withheld employment taxes from employers who neglect to pay as required by Section 3403. *See Slodov,* 436 U.S. at 243-44, 98 S.Ct. 1778. In addition, 26 U.S.C. § 6672 allows

the IRS, in effect, to pierce the corporate veil and proceed against individual officers or employees responsible for collecting the offending company's quarterly employment taxes. Specifically, Section 6672 provides that the officers or employees who, on behalf of an employer, are responsible for collecting withholding taxes and paying them over to the government, and who willfully fail to do so, may be personally assessed a civil penalty equal to the amount of the delinquent taxes.[2] *See Bradshaw v. United States,* 83 F.3d 1175, 1178 (10th Cir.1995) ("The § 6672 penalty may be assessed against (1) any responsible person (2) who has willfully failed to collect, account for, or pay over federal employment taxes."). This is exactly how the IRS proceeded in this case, assessing a Section 6672 "trust fund recovery penalty" against Ms. Farr, as the person allegedly responsible for turning over the clinic's withheld quarterly employment taxes to the government.

When Ms. Farr did not pay the penalty assessed against her, a civil proceeding evolved into a criminal

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[2] Section 6672 provides, *inter alia*:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. . . .

one. The government sought and received an indictment in August 2006 against Ms. Farr. Specifically, the grand jury charged Ms. Farr under 26 U.S.C. § 7201, a generic tax evasion provision providing that

> [a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Significantly for our purposes, however, the government chose in this case not to seek a broad indictment simply reciting the generic language of Section 7201, but instead deliberately added additional detail to its charge. As adopted by the grand jury, the indictment alleged, in pertinent measure,

> [t]hat beginning on or about the 12th day of November, 2001, and continuing until the present, in the Western District of Oklahoma and elsewhere, SKOSHI THEDFORD FARR, the defendant herein, a resident of Oklahoma City, Oklahoma, and Grants Pass, Oregon, did willfully attempt to evade and defeat the payment of the *quarterly employment tax for ATHA-Genesis Chapter due and owing by her* to the United States of America for the quarters 6-99, 9-99, and 12-99 in the amount of $72,076.21 by concealing and

> attempting to conceal from the Internal Revenue Service the nature and extent of her assets and the location thereof and placing funds and property in the names of nominees. All in violation of Title 26, United States Code, Section 7201.

Aplt.App. # 2 at 2-3 (emphasis added).[3]

B

At trial, Ms. Farr's counsel repeatedly called attention to the fact that the grand jury's indictment charged her with evading payment of the "quarterly employment tax for [the clinic] due and owing by her." Counsel urged that an acquittal was required because, under Section 3403, quarterly employment taxes are the sole responsibility of the "employer," specifically identified in the indictment as the ATHA-Genesis Clinic. Counsel noted that Ms. Farr was not the "employer" and quarterly employment taxes thus were not and could never have been, as alleged, "due and owing from her." Rather, counsel argued, Ms. Farr was only ever personally assessed, and failed to pay, a "trust fund recovery penalty" under Section 6672, a matter that counsel argued was not

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[3] This language is drawn from Count Two of the indictment. Count One similarly charged Ms. Farr with evading quarterly employment taxes due for 1995, a period during which Mr. Farr was still alive and operating the clinic; because the jury acquitted Ms. Farr on that count, it is not before us in this appeal.

encompassed within the indictment. Counsel introduced this theory to the jury as early as his opening statement:

> The evidence will be that she hasn't been indicted for failure to pay, the testimony of witnesses will be trust fund recovery penalty assessments, but quarterly employment taxes. And I submit to you that the witnesses in this case will testify that she did not evade the payment of these quarterly employment taxes for Crossroads [or] ATHA-Genesis, as alleged by the government.

Aplt.App. # 6.

As counsel predicted, the government pursued at trial the theory that Ms. Farr should be found guilty by virtue of her failure to pay the trust fund recovery penalty assessed against her personally. Indeed, the government's first witness, IRS officer Mr. Ambuehl, testified that the IRS had assessed the Section 6672 trust fund recovery penalty against Ms. Farr for the clinic's failure to pay its quarterly employment taxes, and that she had not paid the outstanding penalty. On cross examination, Ms. Farr's counsel elicited testimony from Mr. Ambuehl that the "quarterly employment taxes" charged in the indictment were the responsibility solely of the clinic as the "employer"; that Ms. Farr was never the employer; that the unpaid quarterly employment taxes were not her taxes, but those of the clinic; that Ms. Farr's failure to pay the trust fund recovery penalty when it was assessed against her was not charged in the indictment; and

that quarterly employment taxes and trust fund recovery penalties are separate liabilities, due from different parties. Aplt.App. # 7.

This (promising for the defense) line of questioning continued throughout trial. Eventually, the district court intervened to address "the issue raised by the indictment." Aplt.App. # 11 at 112-13. Noting that the government had "four years [prior to trial] to get it right in the indictment," the district court expressed concern that the indictment was legally deficient by charging Ms. Farr for a crime that its own witnesses suggested only the clinic could commit. Aplt.App. # 16. After contemplating a motion for judgment of acquittal, however, the court eventually sought to save the trial by preparing a jury instruction requiring the jury to treat the trust fund recovery penalty discussed at trial and the quarterly employment tax referenced in the indictment as interchangeable terms:

> You are instructed that, as a matter of law, for all purposes relevant to this case, the Trust Fund Recovery Penalty assessed against the defendant is to be treated as the equivalent of the quarterly employment tax referred to in Count 1 and Count 2 of the indictment.

Aplt.App. at 7. The court acknowledged, with some regret, that its jury instruction "forecloses [closing] argument that the defendant did not evade the quarterly employment tax because all she was ever assessed for was the trust fund recovery penalty," and

"cuts . . . clean off" Ms. Farr's primary trial defense based on the language of the indictment. Aplt.App. # 11 at 115, 114. The court went on to state that "it rankles me to be having to scab over this problem [that] could so easily have been avoided. . . . [B]y giving this instruction, I'm pulling the case out of the ditch for the government, and as I said, it rankles me to have to be doing that." *Id.* Aplt.App. # 11 at 113, 115. Ultimately, the jury convicted Ms. Farr, and the district court sentenced her to thirty months in prison, three years of supervised release, and $72,076.21 in restitution, but suspended the sentence pending this appeal.

II

On appeal, Ms. Farr first asserts that the government's evidence at trial and the contested jury instruction constructively amended the indictment against her by allowing the jury to convict her for failing to pay the trust fund recovery penalty rather than evading the quarterly employment taxes of ATHA-Genesis, as alleged in the indictment. We review *de novo* the question whether the district court proceedings constructively amended the indictment, *United States v. Bishop,* 469 F.3d 896, 902 (10th Cir.2006), and in doing so ultimately agree with Ms. Farr.

A

It is axiomatic in our legal system that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States,* 361 U.S. 212, 217, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); *see Schmuck v. United States,* 489 U.S. 705, 717, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) ("It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him."). This prohibition derives from the Fifth Amendment guarantee that "[n]o person shall be held to answer for a[n] . . . infamous crime, unless on a presentment or indictment of a Grand Jury," U.S. Const. amend. V, as well as the Sixth Amendment's assurance of a defendant's right "to be informed of the nature and cause of the accusation" against him or her, *id.* amend. VI. *See Bishop,* 469 F.3d at 902. As the Supreme Court long ago instructed,

> [i]f it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed. . . .

> . . . Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists.

Ex parte Bain, 121 U.S. 1, 10, 13, 7 S.Ct. 781, 30 L.Ed. 849 (1887), *overruled in part on other grounds by United States v. Cotton,* 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

These observations remain no less binding upon us today. Accordingly, "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone,* 361 U.S. at 215-16, 80 S.Ct. 270; *see United States v. Miller,* 471 U.S. 130, 143, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). An unconstitutional constructive amendment of a grand jury's indictment occurs when the evidence presented at trial, together with the jury instructions, "so alter[s] [the indictment] as to charge a different offense from that found by the grand jury." *Miller,* 471 U.S. at 144, 105 S.Ct. 1811; *see Stirone,* 361 U.S. at 213, 80 S.Ct. 270 ("The crucial question here is whether [the defendant] was convicted of an offense not charged in the indictment."); *United*

States v. Apodaca, 843 F.2d 421, 428 (10th Cir.1988) ("An indictment is constructively amended if the evidence presented at trial, together with the jury instructions, raises the possibility that the defendant was convicted of an offense other than that charged in the indictment."). In assessing a claim of an impermissible constructive amendment, our ultimate inquiry is whether the crime for which the defendant was convicted at trial was charged in the indictment; to decide that question, we therefore compare the indictment with the district court proceedings to discern if those proceedings broadened the possible bases for conviction beyond those found in the operative charging document. *See Miller,* 471 U.S. at 138-40, 144-45, 105 S.Ct. 1811; *Stirone,* 361 U.S. at 216-17, 80 S.Ct. 270; *United States v. Sells,* 477 F.3d 1226, 1237 (10th Cir.2007); *Hunter v. New Mexico,* 916 F.2d 595, 599 (10th Cir.1990).

B

Measuring against this standard, we are persuaded that the trial proceedings in this case effected a constructive amendment of the indictment against Ms. Farr. The indictment charged Ms. Farr with willfully attempting "to evade and defeat the payment of the quarterly employment tax for ATHA-Genesis Chapter due and owing by her." But a potentially fatal incongruity soon emerged at trial: the government's own witnesses indicated that quarterly employment taxes are only ever due from an employer, conceded that Ms. Farr was not the employer in this

case, and admitted that she never owed quarterly employment taxes for the clinic. In the face of this, the government sought to proceed against Ms. Farr for her failure to pay the trust fund recovery penalty subsequently assessed against her personally by the IRS under Section 6672. The district court understandably sought to save the trial it had begun and agreed to give the contested jury instruction. But that instruction, by dictating to the jury that the trust fund recovery penalty and the quarterly employment taxes are the same thing, effectively allowed the jury to convict Ms. Farr for failing to pay *either* the clinic's quarterly employment taxes purportedly "due and owing by her" *or* the trust fund recovery penalty assessed personally against her. That is, the district court essentially allowed the jury to consider two possible bases for conviction – the flawed one outlined in the indictment and another more accurate one added at trial.

Had the government simply charged Ms. Farr generically under Section 7201 with the willful evasion of a tax, we might have a different situation. But it did not. Instead, the government opted to include in its indictment particulars about the nature of the tax at issue, specifically charging her with evading the "quarterly employment tax for ATHA-Genesis Chapter due and owing by her." It is settled law in this circuit, as elsewhere, that the language employed by the government in its indictments becomes an essential and delimiting part of the charge itself, such that "[i]f an indictment charges

particulars, the jury instructions and evidence introduced at trial must comport with those particulars." *Bishop,* 469 F.3d at 902, 903 (holding that indictment limited the basis for conviction to a specific firearm by adding the phrase "any ammunition and firearm which has been shipped or transported in interstate commerce[,] *that is* a Hi-Point 9 mm pistol" (emphasis added)). By charging Ms. Farr with willfully attempting to defeat the "payment of the quarterly employment tax . . . due and owing by her," the indictment effectively limited the first element of Section 7201 – a substantial tax due and owing – to liability for quarterly employment taxes which she purportedly owed. From that point on, absent a proper amendment to the indictment by the grand jury, the government was not free to prove any other tax liability at trial. *See Stirone,* 361 U.S. at 218, 80 S.Ct. 270 ("It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened."). The fact that its own witnesses said Ms. Farr owed no such liability may well have put the government in a "ditch" but it was a ditch created by the government's own charging document.

To be sure, the government submits that a constructive amendment did not occur because the employment tax and the trust fund recovery penalty are proverbial alter egos – different words meaning

the same thing. And the government is also surely correct that not every minor variance between the facts as presented at trial and those alleged in the indictment amounts to an unconstitutional constructive amendment. *See Sells*, 477 F.3d at 1237; *United States v. Williamson*, 53 F.3d 1500, 1513 (10th Cir.1995); 1 Charles Alan Wright, Fed. Prac. & Proc.Crim.3d § 128. Although the distinction between the concept of a permissible variance (reversible only upon a showing of prejudice) and an impermissible constructive amendment (categorically impermissible under our Constitution) "has been aptly described as 'sketchy,'" Wright § 128, the Supreme Court has sought to clarify that a variation between the evidence at trial and the indictment generally does not rise to the level of an unconstitutional constructive amendment if it does not raise the possibility that the defendant was convicted of an offense other than that charged in the indictment. *See Miller*, 471 U.S. at 136-39, 145, 105 S.Ct. 1811 (distinguishing constructive amendments from variances on the basis that the former "*broaden* [ ] the possible bases for conviction from that which appeared in the indictment"); *Stirone*, 361 U.S. at 217, 80 S.Ct. 270; *Sells*, 477 F.3d at 1237; Wright § 128.

The difficulty for the government in this particular case is that the difference between the quarterly employment taxes and the trust fund recovery penalty is not merely a semantic one under our precedent. We have previously held that the trust fund recovery "penalty is distinct from and in addition to

the employer's liability for [the employment] taxes," *Bradshaw,* 83 F.3d at 1178, and we are of course bound by that holding. *See also* Michael I. Saltzman, IRS Practice & Procedure ¶ 17.06[1] ("Liability for the penalty and the employer's liability for withholding and employment taxes are separate and distinct, but related."). Neither does the government in this case offer us any persuasive reason for a contrary holding. While the ultimate object of the IRS's interest – recovering the underlying delinquent tax – is undoubtedly the same, the quarterly employment tax provision of Section 3403 and the trust fund recovery penalty of Section 6672 provide materially different means for achieving that end. In much the same way that the traditional equitable law concept of piercing the corporate veil broadens responsibility for the same liability from the corporation to its individual officers and directors, but requires a different set of proof and implicates a different set of defenses in order to do so,[4] employer liability under Section

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[4] Courts and commentators have long referred to the equitable principle of lifting or drawing aside the "thin guise" that is "the veil of corporate entity" to expose the actual individuals "hiding behind" it. I.M. Wormser, *Piercing the Veil of Corporate Entity,* 12 Colum. L.Rev. 496, 504, 499, 497 (1912); *see Fairfield County Tpk. Co. v. Thorp,* 1839 WL 118, 13 Conn. 173, 179 (Conn.1839). The requirements imposed by the states to justify piercing the veil in corporate law vary and "are virtually limitless, but the courts have repeatedly relied on the presence of certain factors. . . . [T]hree of the most frequently cited factors are (1) undercapitalization; (2) a diversion of funds by the dominant shareholders (s); and (3) the failure to observe corporate formalities." 45 Am.Jur. Proof of Facts 3d 1 Part C; *see also id.* at

(Continued on following page)

3403 and employee liability under Section 6672 involve different elements and defenses to secure the same pool of money. Liability for quarterly employment taxes extends only to employers, 26 U.S.C. § 3403; *see Slodov,* 436 U.S. at 243, 98 S.Ct. 1778, while liability for a trust fund recovery penalty depends on a showing that the defendant was the person responsible for paying over the employer's taxes to the IRS and that the defendant acted with the requisite willfulness in failing to do so, *Bradshaw,* 83 F.3d at 1178; *see Burden v. United States,* 486 F.2d 302, 304 (10th Cir.1973); Larry Heinkel, *Eliminating IRS Tax Debts,* 82 Fla. B.J. 56, 58 (2008) ("I.R.C. § 6672 is needed to pierce the corporate veil and does so by imposing a civil penalty."). The difference between the two provisions is illuminated by the fact that, when officers or employees contest the assessment of the trust fund recovery penalty against them, they need not (and often do not) debate the employer's liability for the underlying employment taxes but instead contest whether they qualify as "responsible persons" under the statute. *See, e.g., Bradshaw,* 83 F.3d at 1178; *Denbo v. United States,* 988 F.2d 1029, 1032 (10th Cir.1993). Meanwhile, as here, an individual like Ms. Farr charged for failure to pay quarterly employment taxes allegedly "due and

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§ 24 (listing elements of proof, in addition to the liability of the corporation itself, useful for establishing liability of individual defendants for corporate obligations via piercing the corporate veil).

owing by her" may fairly attempt to defend the charge on the basis that she was not the *employer* from whom the tax was, in fact, due and owing. In this case, however, the government was allowed to proceed at trial against Ms. Farr not merely on the basis of unpaid quarterly employment taxes purportedly "due and owing by her," but also on the basis of the unpaid trust fund recovery penalty, assessed by virtue of her position as a person responsible for the payment of quarterly employment taxes owed by the clinic, even though the government never received a grand jury indictment against her on this latter basis. In a real sense, it is as if Ms. Farr had been charged first as if she were herself the corporate employer with quarterly tax liability and then, after the government's witness admitted Ms. Farr was not the employer and owed no quarterly employment taxes, separately and additionally charged as a person responsible for the corporation's liabilities under a veil-piercing theory. Simply put, as the district court aptly observed at sentencing, Ms. Farr was "charged with evading a tax that [she] never owed and for which [she] w[as] never assessed" (quarterly employment taxes), and when the government detected the problem at trial, "it turned out that I had to fix the indictment in the jury instructions." Aplt.App. # 16.

In reaching the conclusion that the government at trial effected an impermissible constructive amendment of the indictment, we note that we have no occasion to pass on the additional -- and purely hypothetical – question whether the government

could have proceeded against Ms. Farr under Section 7201 on the theory that, while the clinic, not she, was the employer, she willfully attempted to "defeat" payment of the *clinic's* Section 3403 quarterly employment taxes. That is a course the government did not pursue at trial or on appeal before us (neither is it clear whether the government could have pursued such a course under the terms of its indictment in this case: again, the indictment alleged, paradoxically in light of its own witnesses' testimony that the clinic was the employer responsible for payment of quarterly taxes, that quarterly employment taxes "were due and owing by her [i.e., Ms. Farr]"). Likewise, we have no reason to pass on the parties' passing and undeveloped dispute whether Section 7201, rather than Section 7202, is an appropriate vehicle for prosecuting evasion of the Section 6672 trust fund recovery penalty.[5] Instead, we limit our analysis and holding today to the question whether a constructive amendment of the indictment occurred when the

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[5] As the government notes, while there is a linguistic distinction between the term "tax" employed in Section 7201 and the term "penalty" used in Section 6672, 26 U.S.C. § 6671 explicitly states that, "[e]xcept as otherwise provided," any Code reference to a "tax" imposed also includes penalties and liabilities such as the trust fund recovery penalty. At the same time, as the defendant notes, Section 7202 may provide a more tailored avenue for prosecution of those who fail to pay Section 6672 assessments: Section 7202 tracks the language of Section 6672 and makes a responsible employee's willful failure to pay a felony punishable by five years in prison and a $10,000 fine. *See* 26 U.S.C. § 7202.

government proceeded against Ms. Farr for non-payment of the trust fund recovery penalty in the face of an indictment that never referenced such a liability.

On this dispositive score, our case is very much like *Stirone*. There, the indictment charged the defendant with unlawfully obstructing or affecting interstate commerce – specifically, the importation of sand for the manufacture of cement – by extortion and threats in violation of the Hobbs Act. *Stirone*, 361 U.S. at 213-14, 80 S.Ct. 270. At trial, the district court permitted the government to prove, and instructed the jury, that the affected commerce was either the importation of sand *or* the use of the concrete to construct a mill that would manufacture steel products to be shipped interstate. *Id.* at 214, 80 S.Ct. 270. The Supreme Court held that the evidence and instruction charging interference with steel exports constructively amended the indictment by allowing the jury to convict the defendant for a crime other than that charged in the indictment, interference with sand imports. This amendment, the Court held, "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury" because "it cannot be said with certainty that with a new basis for conviction added, [the defendant] was convicted solely on the charge made in the indictment the grand jury returned." *Id.* at 217, 80 S.Ct. 270. Similarly, in the case before us, the indictment charged a general crime but specified the way in which it was

accomplished – in *Stirone* it was the specific commerce obstructed, and here it was the specific tax evaded. Yet, the evidence and jury instructions at trial introduced to the jury an alternative way in which the crime could have occurred – a different commerce obstructed in *Stirone* and a different tax evaded in this case. As in *Stirone,* Ms. Farr's jury was allowed to convict her for a crime (evading the trust fund recovery penalty) different from that charged in the indictment (evading the payment of quarterly employment taxes). We therefore cannot say with certainty that she was convicted solely on the charge made in the indictment the grand jury returned, as the Fifth Amendment requires.[6]

C

The government responds that Ms. Farr cannot credibly claim to have suffered from a prejudicial lack of notice about the government's intentions. In doing so, the government rightly observes that Ms. Farr had been assessed the trust fund recovery penalty on the date cited in the indictment in an amount corresponding exactly to the amounts cited in the indictment. Even so, the question of a prejudicial lack of notice is not so clear cut. As defense counsel stresses, his primary trial tactic (suggesting that the

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[6] *See also Hunter,* 916 F.2d at 599 (holding that jury instruction and testimony about digital penetration constructively amended indictment charging defendant with criminal sexual penetration by "sexual intercourse" only).

clinic, not Ms. Farr, was the employer responsible and assessed for paying quarterly employment taxes) was stripped from him very near the end of trial, after he had devoted considerable time to its presentation and development in his opening statement and witness examinations before the jury. As the district court acknowledged, it is "not an unfair characterization of the situation" to say that counsel was "denied . . . the right to present the defense based on the indictment [the government] g[ave]" him, and which he pursued through much of trial. Aplt.App. # 11 at 114, 115.

More fundamentally still, the prohibition on constructive amendments is grounded not just in the Sixth Amendment's notice requirement but also in the grand jury guarantee of the Fifth Amendment. "As the dual source of the rule makes clear, it protects *both* a defendant's right to be subjected only to charges set by a grand jury and his interests in having sufficient notice." *United States v. Gonzalez-Edeza*, 359 F.3d 1246, 1250 n. 1 (10th Cir.2004). In addition to any Sixth Amendment notice guarantees, the Fifth Amendment right "to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment," *Stirone*, 361 U.S. at 218-19, 80 S.Ct. 270, and it provides a sufficient basis, standing alone, to compel reversal without any further showing of prejudice, *see id.*, 361 U.S. at 217, 80 S.Ct. 270 ("Deprivation of such a basic right is far too serious to be . . . dismissed as harmless error."); *Sells*, 477 F.3d

at 1237 (constructive amendment "is reversible per se"); *Apodaca,* 843 F.2d at 428.[7]

Separately, the government defends its expansion of the indictment on the basis of an unreported district court case which it reads as holding the trust fund recovery penalty "interchangeable" with the quarterly employment taxes, *United States v. Scotto,* 2006 WL 2494430 (S.D.N.Y.2006). We do not read *Scotto* so sweepingly. Rather, that case illustrates and underscores only how the particulars alleged by the government in each indictment matter, and is a confirmation of our practice, stressed in *Bishop,* of

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[7] We acknowledge that in some constructive amendment cases we have loosely invoked the term "harmless error." *See Bishop,* 469 F.3d at 902, 904; *United States v. Tieu,* 279 F.3d 917, 921 (10th Cir.2002). In reality, however, we declined to reverse convictions in these cases only because the alleged variation from the indictment at trial did not raise the possibility that the defendant was convicted of a crime different from that charged in the indictment – that is, there simply was no conviction under an improperly added charge. *See Tieu,* 279 F.3d at 921 ("Even if we assumed the jury instructions improperly allowed the jury to convict for possession of ammunition, the error was rendered harmless when the district court dismissed the ammunition charge" and the special verdict form showed the jury unanimously convicted defendant for the charged conduct of possessing a firearm.); *Bishop,* 469 F.3d at 904 (special verdict form showed the jury convicted defendant for unlawful possession by virtue of the charged conduct of possessing a pistol as well as the uncharged conduct of possessing a bullet); *cf. Apodaca,* 843 F.2d at 428 ("[N]o constructive amendment arises from the admission of acts not charged in the indictment when the court's instructions to the jury preclude the possibility that the defendant was convicted on those acts.").

giving meaning to those particulars. There, much as here, the charging paragraph of the indictment charged a Ralph Scotto with evading and defeating "the payroll tax" for certain businesses. *Id.* at *3. But there, very much unlike here, the grand jury's indictment expressly went on to explain and define this charge in terms of the defendant's personal failure to pay the trust fund recovery penalty, stating that

> On or about December 23, 1991, the IRS assessed SCOTTO personally, as a "person required to collect, truthfully account for, and pay over any tax imposed" by the Internal Review Code, 26 U.S.C. § 6672(a), approximately $32,428.98 for unpaid payroll taxes withheld from employees of Waterset, an amount known as a Trust Fund Recovery Penalty. . . . SCOTTO has evaded payment of Trust Fund Recovery Penalties totaling approximately $49,663.24 for payroll taxes withheld from employees of Waterset and R3A6 for payment on their behalf to the IRS.

Id. at *5-6. In analyzing this language, the district court observed in the course of denying Mr. Scotto's motion to dismiss the indictment that "[t]he Indictment explains that Scotto, pursuant to 26 U.S.C. § 6672(a), is a person responsible for the unpaid payroll taxes of these two corporate entities. . . . Scotto is charged as a responsible person pursuant to Section 6672, not as an employer pursuant to Section 3403." *Id.* at *3, 4.

The *Scotto* court did not purport to hold that the trust fund recovery penalty is, as a matter of law, always and everywhere a synonym for quarterly employment taxes. Rather, it only held that, as used in the peculiar indictment before it, the use of the term "payroll tax" was not fatal because the document defined that term by express reference to the trust fund recovery penalty: "the term 'Trust Fund Recovery Penalty' is interchangeable with the language 'payroll tax' charged in Count One of the Indictment and the Indictment is not facially insufficient for the Government's failure to use the term 'Trust Fund Recovery Penalty' in [one charging paragraph], especially since the term was used, and defined, elsewhere in the Indictment." *Id.* at *5.[8] We have no quarrel with any of this. Our difficulty lies simply in the fact that the indictment against Ms. Farr did nothing of this sort, making no reference whatsoever to the trust fund recovery penalty or Section 6672; neither did the government mention the penalty in its responsive pleadings in the district court, including its bill of particulars. While the language of Mr. Scotto's indictment left no doubt that

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[8] Further underscoring the unlikelihood that the court meant to equate the term "payroll tax" with "trust fund recovery penalty" as a matter of law for all purposes based merely on Section 6671's statement that the term "tax" in the Code usually also means "penalty," *see Scotto*, 2006 WL 2494430 at *4-5, we note that the trust fund recovery penalty applies to all withholding regimes the Code creates, including various retail and manufacturers' excise taxes, not just payroll employment taxes. *See* IRS Practice & Procedure ¶ 17.06.

the grand jury charged him with evading the trust fund recovery penalty and afforded him notice that he would be tried for the payroll taxes "as a responsible person pursuant to Section 6672," the same simply cannot be said of Ms. Farr's indictment. And each indictment must be assessed on its own terms.[9]

III

In addition to challenging the propriety of the charge she faced before the jury, Ms. Farr contends there was insufficient evidence to convict her of that charge. She presses this separate challenge surely well aware of the "venerable principle of double jeopardy jurisprudence," that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, poses no bar to further prosecution on the same charge." *United States v. Scott,* 437 U.S. 82, 90-91, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978); *see also United States v. Pearl,* 324 F.3d 1210, 1214 (10th Cir.2003). In assessing her challenge on this front, however, we are obliged to construe the evidence in the light most favorable to the government, *see*

[9] The government suggests it might have addressed the problem with its indictment in this case if *Scotto* had been decided earlier, but without the benefit of the case it could not have foreseen the problem. But, while it is surely true that *Scotto* was decided after the indictment in this case, it came only two weeks after the entry of this indictment, over five months before trial began, and the government was of course free to seek a superseding indictment at any time prior to trial.

United States v. Rakes, 510 F.3d 1280, 1284 (10th Cir.2007); in doing so we conclude that the government has adduced ample evidence from which a jury could find Ms. Farr guilty of evading the trust fund recovery penalty, and thus, that no double jeopardy impediment exists to her retrial.

A

We begin by noting that our ruling on the constructive amendment question does not speak to the question of evidentiary sufficiency, and thus does not implicate double jeopardy concerns. While a ruling that the evidence is insufficient to support a conviction is equivalent to a judgment of acquittal, and any retrial would thus unconstitutionally place the defendant in double jeopardy,[10] the government may retry a defendant whose conviction is set aside due to defects in the trial process. *See Burks v. United States,* 437 U.S. 1, 16, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Scott,* 437 U.S. at 91, 98 S.Ct. 2187; *Pearl,* 324 F.3d at 1214; *United States v. Dalton,* 990 F.2d 1166, 1168 (10th Cir.1993) (discussing *Montana v. Hall,* 481 U.S. 400, 107 S.Ct. 1825, 95 L.Ed.2d 354 (1987)). The constructive amendment error we have identified in Ms. Farr's trial falls firmly in this latter category.

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[10] The double jeopardy clause provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

The point of the double jeopardy clause is to prevent retrial on a charge of which the defendant has been effectively acquitted (and to prevent second punishment for a crime for which the defendant has already been punished, a problem happily not at issue here). *See Hall,* 481 U.S. at 403-04 & n. 1, 107 S.Ct. 1825. An erroneous constructive amendment, however, does nothing to imply an insufficiency in the evidence to support the jury's verdict convicting Ms. Farr of violating Section 7201, at least by evading the trust fund recovery penalty. Accordingly, "[p]ermitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording [her] an opportunity to 'obtain a fair reajudication of [her] guilt free from error,'" *Lockhart v. Nelson,* 488 U.S. 33, 42, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988) (quoting *Burks,* 437 U.S. at 15, 98 S.Ct. 2141), and serves society's "valid concern for insuring that the guilty are punished," *Burks,* 437 U.S. at 15, 98 S.Ct. 2141. In this respect, a reversal for the introduction of a constructive amendment is akin to a reversal for the "incorrect receipt or rejection of evidence," in that, while exposing an error in the trial process in need of correction, it "implies nothing with respect to the guilt or innocence of the defendant," *Dalton,* 990 F.2d at 1168 (quoting *Lockhart,* 488 U.S. at 40, 109 S.Ct. 285). We note that a sister circuit has reached exactly this conclusion in the constructive amendment context, *see United States v. Mize,* 820 F.2d 118, 119-120 (5th Cir.1987), as have we previously, if perhaps only by implication, *see Hunter,* 916

F.2d at 600 (remanding case for retrial, without discussion, after reversing the conviction due to constructive amendment).

B

Turning directly to Ms. Farr's sufficiency challenge, and thus whether a retrial would expose her to impermissible double jeopardy, we consider whether sufficient evidence was introduced at trial to support the verdict the jury rendered, *Scott*, 437 U.S. at 90-91, 98 S.Ct. 2187; *Hall*, 481 U.S. at 403-04, 107 S.Ct. 1825; *Lockhart*, 488 U.S. at 40-42, 109 S.Ct. 285; *Dalton*, 990 F.2d at 1168, and thus in this case whether a violation of Section 7201 occurred, either by evasion of the quarterly employment taxes or the trust fund recovery penalty. Viewing the facts in the light most favorable to the government, we cannot help but conclude that the government presented sufficient evidence from which the jury could find that Ms. Farr (1) owed a substantial tax liability, at least in the form of the trust fund recovery penalty; (2) acted willfully; and (3) committed an affirmative act of evasion or attempted evasion. *See United States v. Thompson*, 518 F.3d 832, 850 (10th Cir.2008). The evidence at trial showed that Ms. Farr was the employee responsible for withholding and paying over to the government the quarterly employment taxes of ATHA-Genesis during 1999 when the clinic did not pay those taxes; that Ms. Farr was assessed the trust fund recovery penalty in relation to those taxes but did not pay the penalty; and that Ms. Farr did not

have bank accounts or assets in her own name but used a corporate account as her own and directed her children to buy and sell assets on her behalf during this time period.

Before us, Ms. Farr challenges only the government's evidence on the third element of the crime, namely the existence of an affirmative act of evasion or attempted evasion.[11] "An affirmative act requires more than the passive failure to file a tax return; it requires a positive act of commission designed to mislead or conceal. The government only needed to show one affirmative act of evasion for each count of tax evasion." *Thompson,* 518 F.3d at 852 (internal citation and quotations omitted). At trial, the government introduced evidence that Ms. Farr had no bank accounts in her own name but instead incorporated Trinity Consulting and Management Company ("Trinity") in 2000 and established a bank account in Trinity's name, with her children as the signators, which she then used as her personal account. Ms.

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[11] In a footnote, Ms. Farr also asserts that there was insufficient evidence to support the first element of the crime because, as she asserted in her argument for reversal, she did not personally owe the quarterly employment taxes of ATHA-Genesis. We need not pass on this argument because sufficient evidence showed that she at least owed the trust fund recovery penalty, which is, as we have already explained in footnote 5, also a "substantial tax liability." *See* 26 U.S.C. § 6671. To the extent that she challenges the use of Section 7201 rather than Section 7202 to prosecute her failure to pay a Section 6672 liability, that question does not pertain to evidentiary sufficiency but is a question of law we have left open. *See supra* Part II.B.

Farr deposited nearly $49,000 in checks made to her personally, such as salary, into the Trinity account in 2001 and 2002. She then had her children sign blank Trinity checks which she would, in her own hand, fill in and use for personal expenses such as lease payments on her Jaguar, utilities, credit card payments, and the like. In addition, the evidence showed that nearly $47,000 was paid directly to Ms. Farr out of the Trinity account. Ms. Farr does not dispute that this evidence was properly before the jury, only the inference that use of the Trinity account as her personal account was anything but innocent. The jury was free to draw reasonable inferences from the evidence before it, and this evidence was more than sufficient to allow an inference that Ms. Farr's use of the Trinity account was "a positive act of commission designed to mislead or conceal." *Thompson*, 518 F.3d at 852.[12]

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[12] Because we have resolved this appeal without the need to consider the items in the government's addendum to its supplemental appendix, we dismiss Ms. Farr's motion to strike it as moot. We deny Ms. Farr's motion to strike the government's entire answer brief. Because we reverse Ms. Farr's conviction on the basis of an unconstitutional constructive amendment, we also have no need to consider her alternative challenge that the district court's contested jury instruction equating quarterly employment taxes and the trust fund recovery penalty impermissibly directed the jury that the government had proven the first essential element of Section 7201 (a substantial tax liability), except to note that it, too, does not implicate the sufficiency of the evidence against her and thus could not bar retrial.

* * *

The quarterly employment taxes of ATHA-Genesis specified in the indictment against Ms. Farr are not, as the government argues, synonymous with the trust fund recovery penalty assessed against Ms. Farr. Because the indictment specifically charged evasion of quarterly employment taxes but the evidence and jury instructions at trial allowed the jury to convict Ms. Farr for evading the – substantively different – trust fund recovery penalty, the district court proceedings unconstitutionally broadened the basis for conviction, constructively amending the indictment. At the same time, however, the government's evidence at trial was legally sufficient to convict Ms. Farr for tax evasion and thus no double jeopardy impediment exists to her retrial under a properly framed indictment.

Reversed and Remanded.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiffs,	)	
	)	Case No.
vs.	)	CR-08-0271-F
SKOSHI THETFORD FARR,	)	
Defendants.	)	

ORDER

(Filed Jan. 28, 2009)

Defendant seeks dismissal on two grounds. The first motion argues that this prosecution is barred under the Double Jeopardy Clause of the Fifth Amendment. (Doc. no. 19.) The second motion argues that the indictment fails to charge the offense under the appropriate statute. (Doc. no. 20.)

1. Double Jeopardy

In its decision reversing the conviction of Ms. Farr, *United States v. Farr*, 536 F.3d 1174 (10th Cir. 2008), the Tenth Circuit anticipated, and addressed, the double jeopardy challenge now brought by defendant's motion.

In *Farr*, the Tenth Circuit stated that "the government was allowed to proceed at trial against Ms. Farr not merely on the basis of unpaid quarterly

employment taxes purportedly 'due and owing by her,' but also on the basis of the unpaid trust fund recovery penalty, assessed by virtue of her position as a person responsible for the payment of quarterly employment taxes owed by the clinic, even though the government never received a grand jury indictment against her on this latter basis." *Id.* at 1182-83. The indictment in the original prosecution charged Ms. Farr with evading taxes in violation of 26 U.S.C. § 7201, a generic tax evasion provision, and further specified that the tax in issue was the "quarterly employment tax for ATHA-Genesis Chapter due and owing by her." *Id.* at 1178 (indicted under § 7201), 1181 (specifying quarterly employment tax was the tax evaded). The Tenth Circuit found that constructive amendment of the indictment occurred because the jury was improperly instructed that the unpaid trust fund recovery penalty, which is assessed against an individual under 26 U.S.C. § 6672, and quarterly employment taxes, which are assessed against the employer (the clinic) under 26 U.S.C. § 3403, are the same thing. *Id.* at 1180-81. The Tenth Circuit concluded that the improper instruction "effectively allowed the jury to convict Ms. Farr for failing to pay *either* the clinic's quarterly employment taxes purportedly 'due and owing by her' *or* the trust fund recovery penalty assessed personally against her." *Id.* at 1181 (emphasis in original). The Tenth Circuit stated that because "we . . . cannot say with certainty that [Ms. Farr] was convicted solely on the charge made in the indictment the grand jury returned," *id.* at 1184, the indictment had been

constructively amended, and the Court reversed Ms. Farr's conviction on that basis. In doing so, the Court noted that "no double jeopardy impediment exists to her retrial under a properly framed indictment." *Id.* at 1188-89.

Double jeopardy is normally not implicated if a conviction is set aside due to defects in the trial process rather than for reasons that speak to the question of evidentiary sufficiency. *Id.* at 1186. The former is the case here, as the Tenth Circuit has already stated in *Farr*, given the nature of the error causing the reversal as one that "falls firmly" in the category of defects in the trial process. *Id.* at 1186-87. Despite the Tenth Circuit's clear statement on this issue, defendant argues that double jeopardy is implicated because there was insufficient evidence to convict Ms. Farr on the crime *charged*. Defendant argues that the Tenth Circuit's statements in *Farr* regarding the lack of evidence to support a finding that Ms. Farr was an employer, combined with the fact that the indictment charged Ms. Farr with violating 26 U.S.C. §7201 by evading quarterly employment taxes owed only by the clinic and not by her individually, means that Ms. Farr was effectively acquitted on the crime charged, so that double jeopardy bars this prosecution.

Defendant is correct that the Tenth Circuit, and the undersigned as well, have made statements tantamount to a finding that there was insufficient evidence to convict Ms. Farr for evading quarterly employment taxes, because there was no evidence

Ms. Farr was an employer, and only the clinic, as the employer, was liable for that particular type of tax liability. *See, e.g., Farr* at 1183 ("government's witness admitted Ms. Farr was not the employer and owed no quarterly employment taxes;" and noting district court's "aptly" st ed observation that Ms. Farr was 'charged with evading a tax that [she] never owed and for which [she] w[as] never assessed.'"). As indicated in *Farr,* however, the indictment was constructively amended to charge either of two crimes – evading the payment of the quarterly employment taxes, or evading payment of the trust fund recovery penalties. In this sense, and at least for double jeopardy purposes, two crimes were "charged." Thus, defendant's reliance on the general rule that double jeopardy attaches to the crime charged, and its argument that there was insufficient evidence to convict Ms. Farr on the crime charged because there was no evidence that Ms. Farr was an employer who owed quarterly employment taxes, drastically over-simplifies the present situation and does not require dismissal.

In the instant prosecution, the indictment clearly charges Ms. Farr with violating 26 U.S.C. § 7201 by evading the payment of the "trust fund recovery penalties." (Doc. no. 1, ¶¶ 5,6.) As to *this* charge, the Tenth Circuit found there was evidence to support a conviction. *See, Farr* at 1187 ("the government presented sufficient evidence from which the jury could find that Ms. Farr (1) owed a substantial tax liability, at least in the form of the trust fund recovery

penalty; (2) acted willfully; and (3) committed an affirmative act of evasion or attempted evasion."

In short, as there was sufficient evidence to support the jury's conviction of Ms. Farr for violating § 7201 by evading the trust fund recovery penalty, and as that is the only charge set out in the instant indictment, double jeopardy is not implicated. As summed up in *Farr,* "An erroneous constructive amendment . . . does nothing to imply an insufficiency in the evidence to support the jury's verdict convicting Ms. Farr of violating Section 7201, *at least by evading the trust fund recovery penalty.* Accordingly, permitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed. . . ." *Id.* at 1187 (emphasis added).[1]

Defendant also appears to argue that double jeopardy attaches to this prosecution because, as recognized in *United States v. Genser,* 710 F.2d 1426 (10th Cir. 1983), double jeopardy applies if the offense charged and tried in the first prosecution is identical in law to that charged with the second. Defendant states the Supreme Court has established the following test to determine whether, in situations such as this, two prosecutions are identical. *Id.* at

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[1] *Compare,* Article 50 of the Constitution of the Russian Federation: "No one may be repeatedly *convicted* for the same offense." http://www.supcourt.ru/EN/rc.htm (Supreme Court of the Russian Federation, official translation) (emphasis added).

1428. Defendant argues that the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Id.*, quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

Defendant contends that here, the first indictment, which charged evasion of quarterly employment taxes, and the second indictment, which charges evasion of trust fund recovery penalties, charge the same offense. Explaining why quarterly employment taxes and the trust fund recovery penalty are *different,* however, the Tenth Circuit has already observed that employer liability for quarterly employment taxes owed under § 3403, and individual liability for penalties owed under § 6672, "involve different elements and defenses to secure the same pool of money." *Farr,* 536 F.3d at 1182. As stated in *Farr,* liability for quarterly employment taxes extends only to employers, while liability for a trust fund recovery penalty depends on a showing that the defendant was the person responsible for paying over the employer's taxes to the IRS and that the defendant acted with the requisite willfulness in failing to do so. *Id.* Furthermore, in a prosecution for failure to pay the penalty assessed for such conduct, the government must prove that Ms. Farr evaded, or attempted to evade, the payment of the penalty assessed. Thus, this situation is not like the situation in *Genser,* where double jeopardy attached because "distributing" and "dispensing" controlled substances

were the same offense for double jeopardy purposes. *Genser,* 710 F.2d at 1431.[2]

As predicted by the Tenth Circuit in *Farr,* this prosecution does not implicate double jeopardy. Defendant's motion for dismissal based on double jeopardy will be denied.

2. Correct Statute

In *Farr,* the Tenth Circuit left open the question raised by defendant's second motion, which is whether Ms. Farr may be charged under §7201 for attempting to evade or defeat a tax, when the tax in question is the trust fund recovery penalty assessed under § 6672. *Farr,* at 1183, and at n.5. Defendant argues she cannot be prosecuted under § 7201, because § 7202, which largely tracks the language of § 6672, is the only appropriate vehicle. The government responds by arguing that defendant misunderstands the nature of the crime charged. The government argues that this is not a prosecution for evading payment of quarterly employment taxes, but rather, a prosecution for evading payment of

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[2] In *Genser,* the court explained that, other than the status of the offender, the proscribed acts appeared essentially identical as they both involved the delivery of a controlled substance, the only difference being that to prove distribution the government had to prove intentional delivery of a controlled substance whereas to prove dispensation the government had to prove intentional delivery of a controlled substance by a practitioner. *Genser* at 1431.

penalties assessed against a person responsible for the payment of quarterly employment taxes.

The language of § 7201, the generic tax evasion statute, is sufficiently broad to encompass the crime charged in the instant indictment. Section 7201 provides that: "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony. . . ." Although § 6672 refers to the sum in issue here as a "penalty,"[3] while §7201 criminalizes evading payment of "any tax," §6671 states, in pertinent part, that "any reference in this title to [a] 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter." Thus, § 7201's reference to "any tax imposed by this title" includes the trust fund recovery act penalties, which Ms. Farr is charged with evading in this indictment.[4]

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[3] 26 U.S.C. § 6672 provides, in pertinent part: "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

[4] The instant indictment states that Ms. Farr "was assessed trust fund recovery penalties . . . concerning the quarterly employment taxes for the clinic," that "[t]rust fund recovery penalties are taxes pursuant to Title 26, United States Code, Section 6671(a)" and that Ms. Farr "willfully attempt[ed] to evade and defeat the payment of the trust fund recovery

(Continued on following page)

The government's discretion in making charging decisions "is nearly absolute." *United States v. Robertson,* 45 F.3d 1423, 1437-38 (10th Cir. 1995). The government decided to charge Ms. Farr under § 7201, and the language of § 7201 is broad enough to allow for that charge.

Moreover, § 7202, the statute which defendant contends is the only available statute here, pertains to any person required "to collect, account for, *and* pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over *such* tax. . . ." (Emphasis added.)[5] Thus, by its terms, § 7202 encompasses willful failures to pay taxes which are, like quarterly employment taxes, taxes that are "collected" and "accounted" for, and then "paid over" to the government. The trust fund recovery penalty, on the other hand, is a penalty an individual does not "collect" and "account for." Rather, it is a penalty for which an individual is personally liable. *See,* 26 U.S.C. § 6672. The only point here is that whether or not Ms. Farr could have been

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penalties due and owing by her in the amount of $72,076.21," "[a]ll in violation of 26, United States Code, Section 7201."

[5] Title 26 U.S.C. § 7202 provides: "Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

indicted under § 7202 for failure to collect and pay the quarterly employment taxes or for failure to pay the trust fund recovery penalty, the language of § 7202 is not necessarily a completely obvious fit when the crime charged is evading payment of a personal liability such as the trust fund recovery penalty.[6]

For all of these reasons, the court rejects defendant's argument that Ms. Farr was charged under an inappropriate statute. Ms. Farr has been properly charged for violation of 26 U.S.C. § 7201, for evading or attempting to evade a tax, which, as charged under this indictment and per § 6671, may properly include the trust fund recovery penalty specified in the indictment. Defendant's motion seeking dismissal on the ground that Ms. Farr was charged under an inappropriate statute will be denied.

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[6] The court also notes that in *United States v. Scotto*, 2006 WL 2494430 (S.D. N.Y. 2006), a case discussed with approval in *Farr* with regard to the constructive amendment issue, *Farr* at 1185-86, the defendant was charged with a violation of §7201 for evading payment of payroll taxes. Unlike the first indictment against Ms. Farr, the *Scotto* indictment clarified that the IRS assessment which Mr. Scotto was charged with evading was known as the trust fund recovery penalty, a penalty which had resulted from unpaid payroll taxes. *See*, Farr at 1186 ("We have no quarrel with any of this"); *Scotto* at *1 ("Count One unambiguously asserts in Paragraph 6 that Scotto was charged with evading payment of Trust Fund Recovery Penalties, which resulted from the unpaid payroll taxes of [the employer entities]."). Mr. Scotto was not charged under §7202.

Conclusion

After careful consideration, defendant's motions to dismiss are **DENIED**.

Dated this 28th day of January, 2009.

/s/ S.P. Friot
STEPHEN P. FRIOT
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SKOSHI THEDFORD FARR, Defendant-Appellant.	No. 09-6024

ORDER

(Filed Feb. 10, 2010)

Before **KELLY**, **SILER**,* and **TYMKOVICH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court

* The Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk